citizen petitions-to-deny has proven them to be an ineffective mechanism for ensuring that broadcasters are serving the needs of the community. As a practical and effective alternative the Commission should:

1). Adopt quantitative programming guidelines for locally produced issue-responsive programming (eg. public affairs). In the context of petitions-to-deny, the Commission should place the burden of proof on licensees to show how such programming is the direct result of a systematic effort to identify issues of social concern to general and specialized audiences;

2). Gather and analyze data on the amount of locally produced issue-responsive programming for the TV industry as a whole. This would enable the public and the Commission to examine the public interest impact of deregulation on an ongoing basis. The data collection effort could be facilitated by annual reports submitted by TV stations similar to those required prior to deregulation;

3). Adopt a uniform format for issues-programs lists in order that the programming performance of various stations can be easily evaluated and compared. In terms of content, such lists should include detailed program descriptions and explanations of the methods employed to identify each issue of local social concern;

4). Conduct regular and systematic inspections of station public files in order to enforce compliance with disclosure requirements designed to ensure the ability of citizens to evaluate a broadcaster's programming performance.

Diversity of viewpoint is not possible without restoration of the Fairness Doctrine. A long-time bulwark against bias in informational programming, the Fairness Doctrine also ensures that each station is responsible for presenting a diversity of viewpoints on issues of social controversy.

The Commission's recent proposal to relax its multiple

ownership rules[28] follows by seven years its decision to establish a 12 station ceiling cap in each of the broadcast services. The current proposal also calls for repeal of the Commission's duopoly rules. However, it fails to provide any rational basis for departing from its previously held belief that the duopoly rules are a sacrosanct measure adopted to protect the virtues of diversity.[29] Other than financial benefits to private interests,[30] nothing in the proposed rulemaking provides any

---

[28]. See In re Revision of Radio Rules and Policies, MM Docket No.91-140 (FCC 91-156) released May 30, 1991 ("NPRM"). announcing a proposed rulemaking that would relax the duopoly and multiple ownership rules for radio licensees. The FCC also proposed to establish guidelines for time brokerage agreements whereby a station can contract to air its programs over another station in the same market. See also Broadcasting, April 29, 1991, page 19, "FCC Looks to Raise Caps on Radio Ownership," which reported that the FCC plans to relax television multiple ownership and cross-ownership rules in a separate proceeding expected to commence this summer.

[29]. The increase in the multiple ownership cap in 1984 was, in part, justified by continued reliance upon the duopoly rule.

> The Commission in 1938 adopted a strong presumption against granting licenses which would create such duopolies, based largely on the perceived virtues of "diversification of service." This presumption against duopoly ownership become an absolute prohibition when the Commission adopted rules governing commercial FM service in June 1940. To reiterate, we do not propose to change this rule."

Amendment of Section 73.3555, 100 FCC 2d. 17, 21 (1984) (notes omitted, emphasis provided).

[30]. In referring to the economic hardships of the industry the Commission said,

> [T]he proposals presented below are designed to ensure that regulation is not a contributing factor in the demise of radio service. We seek comment on our general evaluation of the situation currently faced by radio broadcasters, specifically, whether radio service (or AM in particular) is foundering as we perceive and, if so, whether our proposed rule changes (or any changes) are useful or appropriate.

NPRM para. 6; see also para. 2.

compelling reason for adopting policies that will harm the public's interest in diversity and localism. The Commission's proposals, which include measures for formalizing time brokerage agreements, will only further contribute to the trend towards non-localism evidenced by this study.

Rather than adopt measures that will at best alleviate the financial woes of private interests (many of which are attributable to deregulatory policies that the industry supported in the past[31]), it is OC/UCC's contention that the Commission should undertake a rulemaking to examine how the public's interest has been negatively impacted by deregulation and consider adoption of the rules recommended above.

---

[31]. According to the Commission's economic model for deregulation supported by the industry at the time of radio deregulation,

> It can be safely stated...that increasing the number of economically viable stations in a market will improve consumer well being. This suggests that Commission involvement in radio markets ought to be limited, as much as possible, to easing entry into the industry.

Radio Deregulation Notice of Inquiry, 73 FCC 2d. 457 at 506. The fractionization of the radio market that has resulted from policies favoring new market entrants, combined with spiralling prices of new broadcast properties (see note 21, supra) have contributed to the demise of the broadcasting industry and now provides the basis for the Commission's present NPRM.

EXHIBITS

EXHIBIT I

FCC DEFINITION OF NON-ENTERTAINMENT PROGRAMMING

"News programs" includes reports dealing with the current local, national and international events, including weather and stock market reports; and commentary, analysis, or sports news when it is an integral part of a news program.

"Public affairs programs" are programs dealing with local, state, regional, national, or international issues or problems, including but not limited to talks, commentaries, discussions, editorials, speeches, political programs, documentaries, mini-documentaries, panels, roundtables and vignettes, and extended news coverage (whether live of recorded) of public events or proceedings, such as local council meetings, congressional hearings, etc.

Other Non-entertainment programs" includes all other programs which are not intended primarily as entertainment (e.g. music, drama, variety, comedy, quiz, etc.) and do not include play-by-play and pre- or post-game related activities of sports events and separate programs of sports instruction, news, or information (e.g., fishing opportunities, golfing instructions, etc.). This category gives recognition to program types which FCC historically has cited as important to services in the public interest (e.g. agriculture, religious, educational).

Source: 47 CFR § 73.1810 (1983).

Exhibit II

STRATIFIED SAMPLING OF RANDOMLY SELECTED MARKETS*

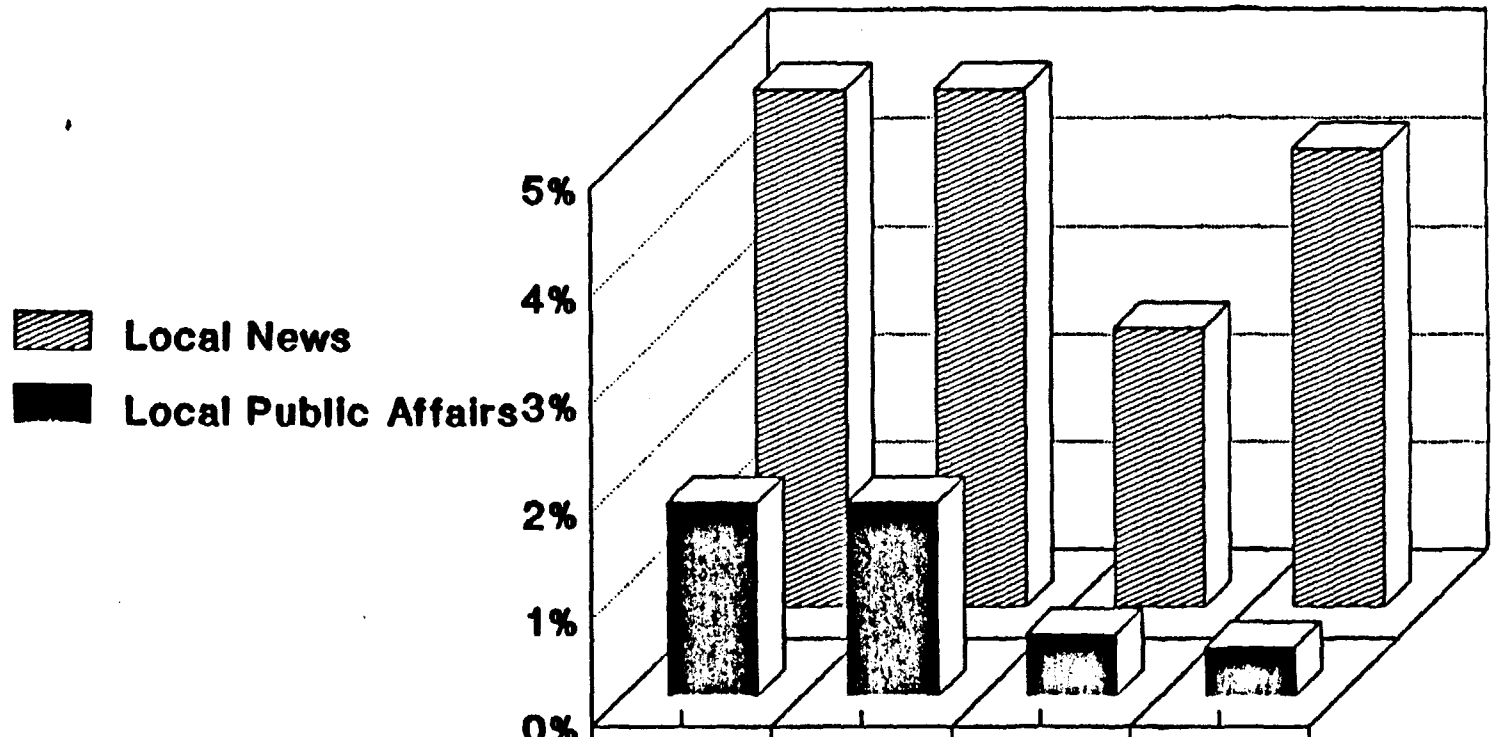
1974	1979	1984	1989
High Density Markets			
3	1	8	1
7	5	3	7
		11	
Moderate Density Markets			
39	49	16	16
41	38	23	18
16	44	26	20
23	16	29	27
47	14	30	32
36	21	39	35
30	19	49	37
43	24	13	41
Low Density Markets			
77	58	153	79
96	150	81	157
160	201	55	122
85	101	125	128
146	203	100	103
153	134	111	119
133	190	113	137
127	89	145	141
64	55	177	164
203	66	135	110
		205	
Total # of Markets			
20	20	22	20

* Numbers refer to Arbitron market designations.

CHARTS

CHART I

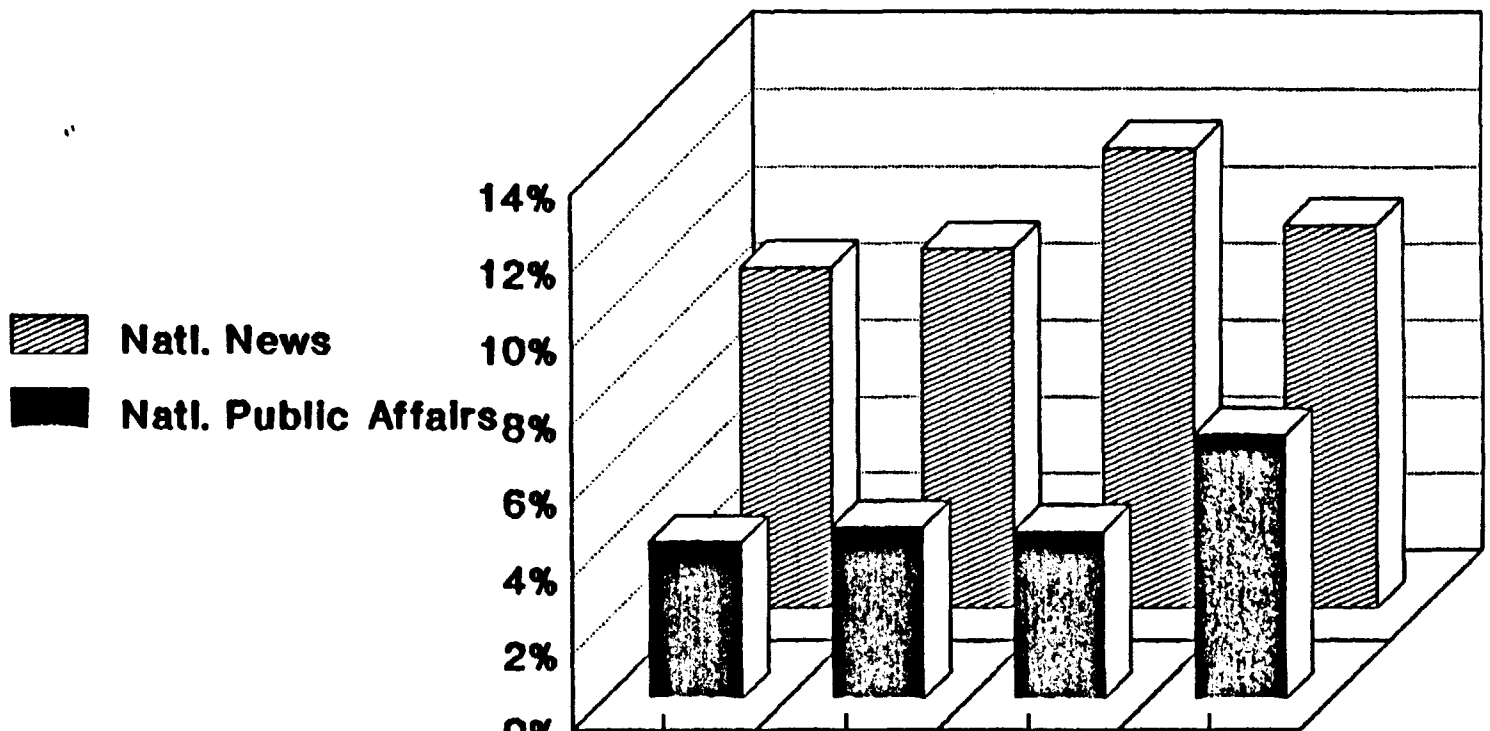
LOCAL NEWS & PUBLIC AFFAIRS
6 AM to MIDNIGHT



	1974	1979	1984	1989
Local News	4.8%	4.8%	2.59%	4.25%
Local Public Affairs	1.8%	1.8%	0.57%	0.45%

Chart III

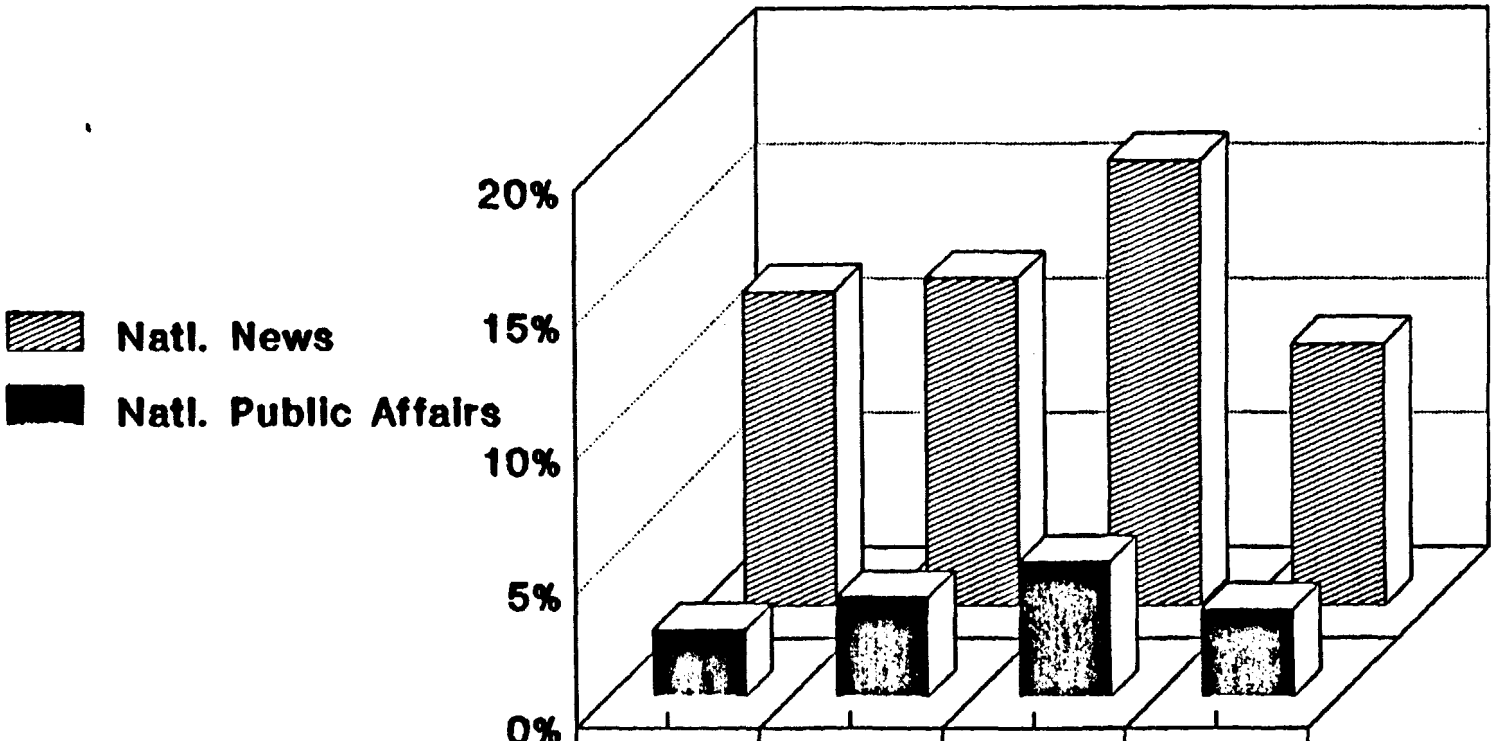
NATIONAL NEWS & PUBLIC AFFAIRS
6 AM to MIDNIGHT



	1974	1979	1984	1989
Natl. News	8.9%	9.4%	12%	10.01%
Natl. Public Affairs	4.1%	4.5%	4.38%	6.91%

Chart IV

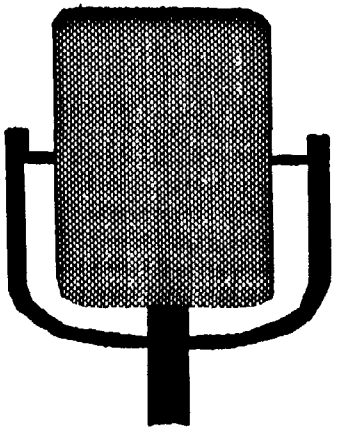
NATIONAL NEWS & PUBLIC AFFAIRS
PRIME TIME

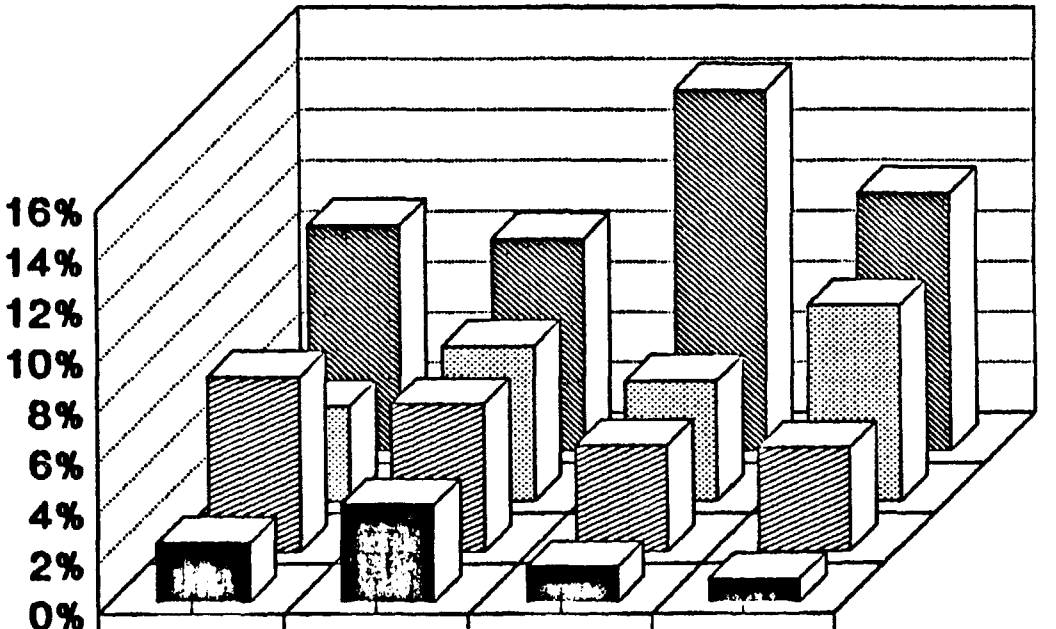


	1974	1979	1984	1989
Natl. News	11.7%	12.2%	16.58%	9.76%
Natl. Public Affairs	2.5%	3.7%	5.02%	3.26%

Chart V

NEWS & PUBLIC AFFAIRS
IN HIGH DENSITY MARKETS



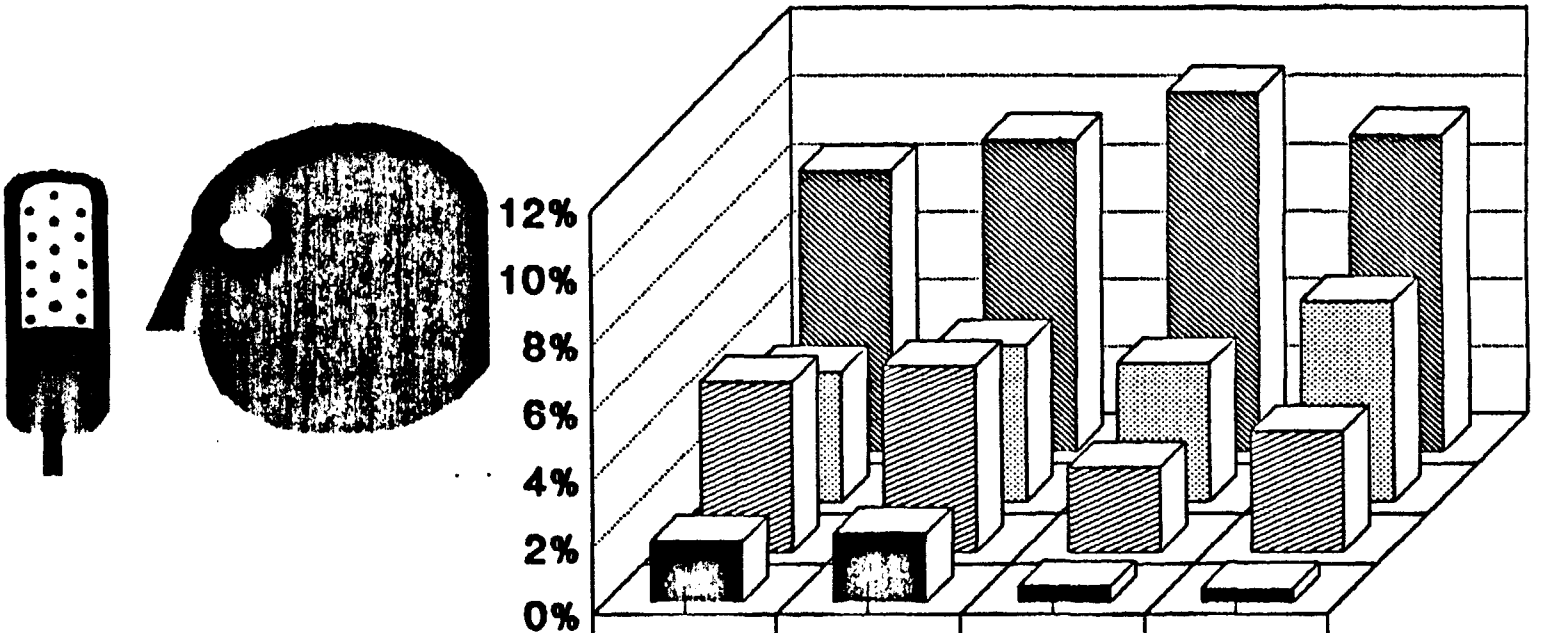


	1974	1979	1984	1989
Natl. News	8.95%	8.4%	14.28%	10.22%
Natl. Public Affairs	3.75%	6.15%	4.76%	7.76%
Local News	6.95%	5.85%	4.2%	4.11%
Local Public Affairs	2.35%	3.85%	1.38%	0.9%

percentages apply to 6 am to midnight

Chart VI

NEWS & PUBLIC AFFAIRS
IN MODERATE DENSITY MARKETS

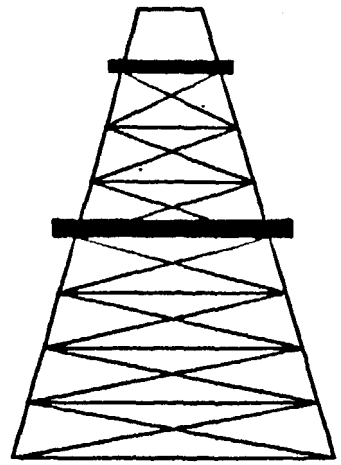


	1974	1979	1984	1989
Natl. News	8.33%	9.25%	10.64%	9.4%
Natl. Public Affairs	3.88%	4.65%	4.11%	5.93%
Local News	5.05%	5.53%	2.51%	3.58%
Local Public Affairs	1.81%	2.05%	0.46%	0.41%

percentages apply to 6 am to midnight

Chart VII

NEWS & PUBLIC AFFAIRS
IN LOW DENSITY MARKETS



	1974	1979	1984	1989
Natl. News	8.4%	9.21%	12.74%	10.78%
Natl. Public Affairs	4.11%	3.72%	4.57%	7.93%
Local News	4.18%	4.92%	1.82%	5.28%
Local Public Affairs	1.15%	1.15%	0.29%	0.32%

ATTACHMENT

BROADCAST DEREGULATION: IN WHOSE INTEREST?

by

Julie Lynch*

May 14, 1991

Institute For Public Representation
Georgetown University Law Center
600 New Jersey Avenue
Washington, DC 20001

Television is one of the most persuasive forces in contemporary society. It is the medium from which seven out of ten Americans receive news and information.[1] Despite television's diverse power and pervasiveness, the Federal Communications Commission (hereinafter, the FCC or Commission), has worked, over the last decade, to completely deregulate the broadcast industry. In proceeding after proceeding, the Commission has retreated from its mandate under the 1934 Communications Act and has relied on market forces[2] to ensure that broadcasting is accomplished in the "public convenience, interest and necessity." [3]

---

* Julie Lynch is a third year law student at the Georgetown University Law Center and completed this paper as an intern with the Institute For Public Representation and under the direction of DeBorah S. Smith, Graduate Fellow and Angela J. Campbell, Associate Director.

[1] Cherchglia, Changing Channels in Broadcast Regulation: Leaving Television Advertising to Containment by Market Forces 34 Case W. Res. 465 (1984), citing D. Cross, Mediaspeak 68 (1983).

[2] "Market forces" refers to a means by which the public may directly influence communications policy by removing the Commission as an interpreter of the public interest. See Fowler & Brenner, A Marketplace Approach to Broadcast Regulation, 60 Tex. L. Rev. 207, 209 (1982). "The issue presented by the Commission's market forces rationale is whether the [Communications] Act permits the Commission to, in essence, define the public interest to be virtually no regulation at all." Rau, Allocating Spectrum by Market Forces: the FCC Ultra Vires?, 37 Cath. U.L. Rev. 149, n. 104.

[3] 47 U.S.C. § 303.

This paper presents an overview of television deregulation. It first outlines the historical decisions made by the FCC prior to 1984 and briefly discusses how those decisions became the foundation of the public trusteeship model of broadcasting. The paper then attempts to ferret out the reasoning behind the Commission's change in policy which eventually resulted in the repeal of most of the rules originally adopted to promote broadcasting in the public interest. It will further demonstrate how the FCC's illogical substitution of structural controls for program content regulation has worked against its goal of promoting media diversity, community service and citizen participation in the licensing process. In conclusion, the paper discusses the Commission's current approach and how it may be structured to compensate for failures in its deregulatory plan.

Pre-Deregulation Public Trusteeship Model

Prior to 1927, the allocation of radio frequencies was left entirely to the whim of the private sector and the vicissitudes of an unregulated marketplace.[4] Radio stations began "a frenzied effort to enlarge their coverage areas, reach larger audiences, and achieve competitive advantage."[5] Broadcasters changed their

---

[4] See Deregulation of Radio, 84 FCC 2d 968, 971, recon., 87 FCC 2d 797 (1981), aff'd in part, rev'd in part, Office of Communication of the United Church of Christ v. FCC, 707 F2d 1413 (D.C Cir. 1983) (hereinafter Radio Deregulation).

[5] Emery, Broadcasting and Government, Michigan State University Press, 1971 at 23.

frequencies, power levels and operating hours at will. Soon there were more licensees than there were frequencies to allocate within the spectrum. The resulting chaos motivated Congress to intervene and rescue the industry from potential self-destruction. Congress enacted the Radio Act of 1927.[6] This legislation set the stage for the present regulatory scheme under the Communications Act of 1934 which entrusted broadcasters with free use of the airwaves in exchange for a commitment to serve in the interests of the community.

Several aspects of the Communications Act differentiated broadcasting regulation from the regulation of other industries. Of central import in broadcasting is the concept of the licensee as a public trustee. To protect this trust, the Commission has an affirmative obligation to find that each initial grant, renewal or transfer of a broadcast license is in the "public interest...."[7] Since broadcast regulation began, Congress' objective was to keep the business of broadcasting in the private rather than the public sector. However, ownership of the airwaves remained with the American people.[8] Broadcasters would not be charged for the use of the airwaves, but instead, were

---

[6] The legislative history of the 1927 Act also indicates that Congress was concerned about the monopoly of the radio industry by a select few and the specific power and vertical integration of the so-called "radio trust." See, e.g., Deregulation of Radio, Notice of Inquiry and Proposed Rule Making, 73 F.C.C.2d 457, 462, (D.C. Cir. 1979)

[7] See 47 U.S.C. §§ 307(a), 309(a), 310(d).

[8] See 47 U.S.C. §§ 301, 304, 307(d).

"burdened by enforceable public obligations."[9] In exchange for the right to use the public airwaves, the FCC anticipated that licensees would serve the particular informational needs of their local communities.

The public interest standard has evolved into the touchstone for Commission regulation; it encompasses far more than overseeing the engineering and technical aspects of spectrum use. At the core, it embodies the concern that licensees must provide sufficient informational and political programming to have a well-informed electorate.[10] Inherent in this public interest notion is the requirement that programming be responsive to the problems, needs and interests of the local community,[11] that all stations discuss all sides of controversial issues of public importance,[12] that the public receive "suitable access to social, political, esthetics, moral, and other ideas and experiences,"[13]

---

[9] Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1003 (D.C. Cir. 1966) ("UCC I"). The short forms utilized in this article are those commonly employed in communications practice to distinguish among several cases named Office of Communication of the United Church of Christ v. FCC. UCC I involved the license renewal of WLBT-TV and established standing on behalf of listeners and viewers. UCC II, 425 F.2d 543 (D.C. Cir. 1969), also related to the WLBT-TV renewal. UCC III, 707 F.2d 1413 (D.C. Cir. 1983) is the decision reviewing radio deregulation. UCC IV, 779 F.2d 702 (D.C. Cir. 1985) is the decision appealing the FCC's order on remand of UCC III, and it concerns the adequacy of issues/programs lists.

[10] See Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 117 (1973).

[11] 47 U.S.C. § 307(b); Henry v. FCC, 302 F.2d 191, 193-94 (D.C. Cir. 1962).

[12] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

[13] Id. at 390.

and that programming fairly reflect the tastes and viewpoints of minority groups.[14]

Through continual refinement of its policies and rules, the Commission unequivocally concluded in 1946 that "there can be no doubt that Congress intended the Commission to consider overall program service in processing applications," and that the agency is "under an affirmative duty, in its public interest determinations, to give full consideration to program service."[15] Fourteen years later, the Commission released its 1960 Programming Statement, which explicitly held that providing the best practicable programming service in response to local concerns is the principal element of a licensee's public interest obligation.[16]

To achieve this public interest programming objective, the Commission originally focused on formulating detailed programming and ascertainment guidelines. Prior to 1981, licensees applying for authority to acquire or construct a broadcasting station needed to provide the Commission with detailed programming, ascertainment and financial data.[17] With this data, the

---

[14] National Association for the Advancement of Colored People v. FCC, 425 U.S. 662, 670 n. 7 (1976).

[15] Report on Public Service Responsibility of Broadcast Licensees at 11-12 (1946) ("Blue Book").

[16] 1960 Programming Statement, 44 F.C.C. at 2312.

[17] All applicants seeking a permit to construct new facilities filed a Form 301, which prior to deregulation requested information about the applicant's ownership structure, legal and financial qualifications, program and engineering proposals, and equal employment opportunity programs. Form 301

Commission and the public could adequately assess whether the applicant would be likely to honor its statutory obligation to provide service in the public interest.[18]

Prior to granting an application, the Communications Act provides an opportunity for any parties in interest -- including members of the listening and viewing public -- to file a petition to deny.[19] If the petition to deny alleges specific facts which are based primarily upon information available only from the initial licensing application, the Commission must schedule a license hearing.[20]

---

also initially required applicants to provide specific quantitative and qualitative proposals regarding their anticipated programming formats. The programming section of Form 301 consisted of nineteen pages and directed applicants to concretely inform the Commission of their programming plans.

Applicants were specifically required to "(1) document the means by which they ascertained the needs and interests of the public to be served by the station; (2) describe the significant needs and interests which they believed the station would serve during the initial license term; and (3) list typical and illustrative programming that they planned to air to meet those needs and interest. In addition,they also were required to state the minimum amount of time, between 6:00 a.m. and midnight, which they planned normally to devote each week to news, public affairs, local programming and all other programs." Request for Declaratory Ruling Concerning Programming Information in Broad Applications For Construction Permits, Transfers and Assignments, 3 FCC Rcd 5467, 5470 n. 8 (1988).

[18] A construction permit is a prerequisite to obtaining a license and therefore is essential in the licensing process. 47 U.S.C. § 319. An application for a construction permit is, in essence, an application for a station license. See Ashbacker Radio Corporation v. FCC, 326 U.S. 327 (1945).

[19] 47 U.S.C. § 309(d).

[20] 47 U.S.C. § 309(e). Even in the absence of a petition to deny, the FCC can grant the application only after making an affirmative finding that the broadcaster in question will serve

In order for the public to adequately exercise its statutory right to participate in the licensing and renewal process, the public needs access to programming proposals and actual performance data. The detailed information formerly required on the initial license application and on the renewal license application allowed Commission review and public oversight of an applicant's programming performance as compared to the programming promises or proposals made initially or on a prior renewal application.[21]

Even though the maximum license term for all broadcast stations has been extended,[22] the FCC historically relied on citizens' complaints and petitions to deny to ensure that licensees met their public trust obligations.[23] Statements about programming plans clearly helped to facilitate such a determination. Prior to deregulation, the FCC reviewed the

---

the public interest. Id. at 309(a).

[21] With regard to promise versus programming evaluations, the Commission explained that "an applicant is not, of course, expected to adhere inflexibly in day-to-day operations to the specific programming proposals contained in its previous application. At the same time, it is clear that an applicant cannot completely disregard its previous programming proposals in the hope that its application will slip by and still be acted upon favorably." Revision of FCC Form 303, Application for Renewal of Broadcast Station License, Notice of Inquiry and Proposed Rulemaking, 52 F.C.C.2d 184, 189 (1975).

[22] Initially, the maximum license term for all broadcast stations was three years. In August of 1981, Congress amended 47 U.S.C § 307(d), to extend the term to five years for television stations. Public Law 97-35, § 1241(a) (August 13, 1981), reprinted in U.S. Code Cong. & Ad. News 736 (1981).

[23] See Office of Communications of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966); 47 U.S.C. § 309(d).

programming practices of incumbent broadcasters at renewal time. Members of the public who wished to challenge a station's license renewal or transfer and assignment could obtain the necessary information to determine whether the licensee had effectively ascertained community programming interests and whether she had "render[ed] the best practical service to the community"[24].

For fifteen years, the Commission used a "long-form" license renewal application as a means to assess whether a licensee had fulfilled this obligation as a trustee of the airwaves. The "long-form" application requested detailed information about a licensee's non-entertainment programming, the amount of programming devoted to children, and the licensee's efforts to ascertain the needs and concerns of the local community. The form also requested relevant information about a licensee's previous programming promises as a means to evaluate the success of its present programming performance. In the early seventies, the Commission adopted formal ascertainment requirements[25] to ensure that each station knew the relevant issues facing their communities. Licensees were required to take specific steps and document their ascertainment efforts.[26]

---

[24] Report and Statement of Policy Re: Commission en banc Programming Inquiry, 44 F.C.C. 2303, 2311-12 (1960).

[25] Ascertainment of Community Problems, 27 F.C.C.2d 650 (1971); First Report and Order in Docket No. 19715, 57 F.C.C.2d 418, 441 (1975), recon. granted in part, 61 F.C.C.2d 1 (1976).

[26] Licensees had to maintain an ongoing ascertainment process during their license terms, possess a community leader checklist, maintain information on the composition of the community in the public file, place documentation of

In addition to documenting these ascertainment procedures, licensees were also required to maintain detailed program logs, information on station ownership, EEO programs, and sponsorship identification of controversial programming.[27]

The so-called "5, 5, 10" rule also provided guidance to broadcasters on the minimum percentage of programming hours needed to address news, public affairs and local issues as well as provide other non-entertainment programming.[28] If a licensee complied with the respective amounts of time required to be devoted to each one of these programming aspects, she could then count on a more streamline Commission staff review of her license renewal application.

Throughout the history of broadcast regulation, the Commission conducted numerous rulemaking proceedings to evaluate, amend and refine its licensing procedures. After fifty years of regulation, the Commission had created a successful and efficient

---

ascertainment procedures in the station public inspection file, and annually file a list of not more than ten problems and needs of the station's service area along with a list of programs treating those problems and needs. Revision of Programming and Commercialization Policies, Ascertainment Requirements and Program Log Requirements for Commercial Television Stations, 98 F.C.C.2d 1076, 1097, (1984), (hereinafter T.V. Deregulation).

[27] Carter, Franklin, Wright, The First Amendment and the Fifth Estate, at 100 (1986).

[28] "[P]rogramming criteria... adopted in 1976... require Commission action on any commercial television station renewal application reflecting less than five percent local programming, five percent information programming (news and public affairs) or ten percent total non-entertainment programming. See T.V. Deregulation, 98 F.C.C.2d at 1078, citing 59 F.C.C. 2d 491, 493 (1976) and 47 C.F.R. § 0.281.

regulatory scheme facilitating Commission oversight and public participation. However, just as the public was beginning to reap the benefits of this maturing regulatory scheme, the Commission did an about face in 1981 and began the incremental, but eventually far reaching, deregulation of television broadcasting.

The Marketplace Deregulatory Model

After a decade of rulemakings in the 1980's, the Commission has significantly deregulated the television broadcast industry.[29] The Market Place Theory which provided a basis for deregulation of the radio industry laid the foundation for the repeal of program content deregulation of the television industry in 1984. The FCC's believed that increasing the number of economically viable stations in a market would lead to greater consumer satisfaction.[30] Instead of relying on regulation to ensure that broadcaster serve the public interest, the Commission determined that licensees, who were chiefly motivated by profits and the need to retain audience share, would respond to the needs and desires of the viewing public. In the Commission's view,

> market incentives will ensure the presentation of programming that responds to community needs and provide sufficient incentives for licensees to become and remain aware of the needs and problems of their communities.[31]

---

[29] Radio Deregulation, 84 F.C.C.2d 968 (1981).

[30] See The Revision of Programming and Commercialization Policies, Ascertainment Requirements, for Commercial Television Stations, 98 F.C.C. 2d 1076, 1086 (D.C. Cir.1984).

[31] Id. at 1077.